Supreme Court, U. S.
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in the

Supreme Court

of the

United States

OCTOBER TERM, 1979

NO. 79-1212

JEROME WEINKLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, JEROME WEINKLE, by and through his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 6, 1979.

JUDGMENT OF THE COURT BELOW

The Court of Appeals did not enter an opinion. A copy of the Order and Judgment is appended to this Petition as Appendix A. Findings of Fact and an Amended Order entered by the District Court for the Southern District of Ohio are appended hereto respectively as Appendices B and C.

JURISDICTION

The Judgment of the Court of Appeals affirming the Judgment of the United States District Court was entered on December 6, 1979. The Petition for Rehearing was denied on January 11, 1980. The Motion For Stay was granted on January 14, 1980, for a period of thirty days pending the filing of a Petition for Writ of Certiorari. This Petition is timely filed. See Rule 22(2), Rules of Supreme Court. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 United States Code §1254(1).

QUESTION PRESENTED

WHETHER THE EXERCISE OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION BY AN IMMUNIZED GRAND JURY WITNESS IS

VALID WHERE THE PROSECUTOR EXPRESSES DISBELIEF OF THE WITNESS' PROFERRED GRAND JURY TESTIMONY, CREATING IN THE WITNESS A LEGITIMATE FEAR OF AN INDICTMENT FOR PERJURY OR FALSE STATEMENT?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself."

Title 18 United States Code §1621, reads in part:

> Perjury generally
>
> Whoever —
>
> (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true;
>
> . . .

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisioned not more than five years, or both.

Title 18 United States Code §1623, reads in part:

False declarations before grand jury or court

(a) Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Title 18 United States Code §6002, reads in part:

Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

. . . and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the

order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Title 28 United States Code §1826, reads in part:

Recalcitrant Witnesses.

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of —

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

STATEMENT OF THE CASE

The Court of Appeals held that the grand jury witness—petitioner, having been granted immunity, was required to answer questions propounded by the grand jury. This was based on the finding that "this case created no exception to the duty of the witness to answer."

This Petition is based on the premise that where a prosecutor expresses disbelief of an immunized grand jury witness' *proferred* answer, (which the witness contends is truthful) then the witness has established the basis for the valid exercise of the Fifth Amendment privilege against self-incrimination. The statute extending immunity *excludes* protection from a perjury or false statement prosecution.

A. Statement Of The Proceedings.

On June 22, 1977, Weinkle was served and complied with three grand jury subpoena duces tecum calling for the production of all books, records and documents regarding three corporations of which he was a principle; Dutch Inns of America, Inc., Thrifty Dutchman, Inc. and Dutch Inn of Orlando, Ltd., returnable in the Southern District of Ohio. Prior to this, the witness had voluntarily permitted government agents access to the books and records of these corporations. Weinkle complied with three subsequent grand jury subpoenae duces tecum issued during late 1977, and January, 1978, for more corporate records. Consequently, the grand jury possessed most of the records of the three corporations for the years 1972 through January, 1978.

On April 26, 1979, the District Court entered an Order granting the witness statutory immunity, pursuant to Title 18 United States Code §6002. On April 27, 1979, the witness appeared before the grand jury pursuant to the grant of immunity and answered *all* questions, except those concerning the disposition of certain specified sums. The witness expressed a need to review the books and records in the grand jury's possession so as to accurately respond to the questions. The witness was excused at the end of this session with his testimony to continue at a future unspecified date.

On May 24, 1979, after examining the records (along with an accountant), the witness reappeared and again answered all questions propounded by the grand jury, except those which the witness was previously unable to answer. Instead, the witness asserted his Fifth Amendment privilege against self-incrimination. In a brief hearing before the District Court, the witness was granted an additional few weeks to permit further review of personal and corporate books and records in an attempt to answer the grand jury's questions.

On June 19, 1979, the witness returned to the grand jury for a third time and answered all grand jury questions, except those previously refused, again asserting his Fifth Amendment privilege against self-incrimination as to those particular questions.

A Memorandum of Law was submitted to the District Court, along with a brief oral statement in support of the witness' position. Upon motion of the government, the witness was held in civil contempt in violation of Title 28 United States Code §1826. The

witness was committed to the custody of the United States Marshal for the length of the grand jury, or until he answered the grand jury questions. The District Court stayed the sentence pending appellate resolution of the issue. The witness was released on $10,000.00 personal recognizance bond.

On December 6, 1979, after oral argument, the Sixth Circuit Court of Appeals entered its judgment affirming the judgment of the District Court.[1]

On January 11, 1980, the Court of Appeals denied the Petition for Rehearing. On January 14, 1980, the Appellate Court granted petitioner's Motion for Stay for thirty days pending the filing of this Petition for Writ of Certiorari.

B. Statement Of Facts.[2]

On April 27, 1979, after receiving statutory immunity, the witness appeared before a federal grand jury in Cincinnati, Ohio. He testified that he was involved as a principle in three corporations; Dutch Inns of America, Inc., Thrifty Dutchman, Inc. and Dutch Inn of Orlando, Ltd., which had certain hotel and motel holdings. In mid 1973, due to energy and economic difficulties, serious financial problems arose. In order to keep the businesses alive, Weinkle obtained a two million dollar loan from the Hotel And Restaurant

[1]The Court denied the witness' Motion to Supplement the Record on Appeal.

[2]These facts came solely from the witness' testimony.

Employees and Bartenders International Union (HREU) for the Dutch Inn of Orlando, Ltd. and a subsequent $700,000.00 loan from the Southern Nevada Culinary Workers Pension Fund to Thrifty Dutchman, Inc. These complicated financial transactions, involving Weinkle's personal accounts as well as the three corporate accounts, were reviewed by the grand jury in detail.

The grand jury investigation was aimed at determining whether there were any kickbacks paid to HREU officials in return for these loans. Weinkle testified that at no time did he either participate in or know of any kickbacks or illicit payments to any union officials in order to obtain these loans. To his knowledge, only the normal closing costs were involved.

The prosecutor, DelGrosso, then identified six documented instances, from May 8, 1974, to March 14, 1975, where the witness obtained a total of $126,500.00 cash from either personal or corporate accounts. When asked about the disposition of these funds, Weinkle said he would have to examine his records in order to give an accurate and truthful answer. This was due basically to the complex personal and business finances involved in the transactions and the span of time being close to five years. However, the witness unequivocally *denied* the allegation that any of the funds were used to pay off any union official.

On May 22, 1979, Weinkle and an accountant received the exact documents in question (corporate checks made out to cash and personal bank withdrawals) and reviewed the corporate records within

the grand jury's possession in an attempt to determine the disposition of the funds. Upon his return to the grand jury on May 24th, the general inquiries were repeated, and, again, the witness denied using any of the specific funds for payoffs. However, this time he asserted the Fifth Amendment privilege against self-incrimination, rather than answer the questions regarding the disposition of the funds. As explained to the District Court at a brief hearing thereafter, the witness' assertion was based on the fear of a possible perjury or false statement prosecution by giving the truthful answer, that he did not know or recall the disposition of the funds. The Court granted an additional two weeks allowing Weinkle and the accountant to review further personal and corporate books and records not in the grand jury's possession.

On June 19th, the witness returned to the grand jury. After the same questions and answers were repeated, including a denial of using the cash for payoffs, the witness asserted his Fifth Amendment privilege to the question, "You have no idea what happened to the cash?"

Immediately thereafter, government counsel, DelGrosso, along with the witness and his attorney, appeared before the District Court upon the government's ore tenus motion to hold the witness in civil contempt. The witness explained his position as having answered each of the grand jury questions to the best of his ability; including those questions going to the heart of the grand jury investigation, a denial of payoffs to union officials in exchange for the loans.

The witness adopted his counsel's representations that he had no independent recollection of the disposition of the funds and a thorough review of the books and records was insufficient to assist him in giving an *accurate* answer to the grand jury. Consequently, the witness was left with only one truthful answer, "I do not know" or "I cannot recall".

In a Memorandum of Law submitted to the District Court at this time, several *other* facts became clear. First, the accountant who reviewed the books and records with Weinkle was available to the Court for an *in camera* examination to explain the witness' good faith attempt to resolve the grand jury's inquiry.

Most important, during the time period of this investigation, the government, through its representative, DelGrosso, had expressly alleged (to defense counsel) that the witness would be committing perjury by denying the payoffs (to union officials);[3] inferentially, that is, the funds in question were used for these payoffs. In fact, DelGrosso stated to the District Court at the contempt hearing, *in response to Weinkle's proferred position* that "[h]e (Weinkle) can explain these funds. He refuses to explain the funds."

The District Court, finding the Fifth Amendment inapplicable in this case, held the witness in civil contempt pursuant to Title 28 United States Code §1826.

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[3]The Court of Appeals denied the witness' Motion to Supplement the Record on Appeal with affidavits regarding these out of court allegations by the government, or alternatively to remand the matter to the District Court for a further hearing on these allegations.

REASONS FOR GRANTING THE WRIT

The holding of this case concerns an important question of federal constitutional law which has not been, but should be settled by this Court.[4]

The single issue presented in this petition requires a balancing of the constitutional protection of the Fifth Amendment privilege against self-incrimination with the scope and effect of statutory immunity, where the spectre of perjury is raised. The importance of this issue, it is respectfully submitted, is self-evident. It is the combination of the *unique* factual setting and its legal overtones, along with the importance of this area of litigation, which qualifies this case as one worthy of issuing a Writ of Certiorari.

The appellate judgment offers little insight into this matter since it states in a cursory fashion that "[t]he circumstances of this case created no exception to the duty of a witness to answer (the grand jury inquiry) after being granted immunity". However, by granting a stay of the *contempt* citation in order to present this Petition, the Sixth Circuit has recognized the importance of this issue.

It is essential in analyzing this sole issue to note that the prosecutor's allegations regarding the witness' involvement in the payoffs came prior to the first invocation of the Fifth Amendment. Yet the witness did not refuse to answer the questions concerning the alleged payoff. It was only when faced with the proposition of being unable to explain how the funds

[4]See Rule 19(1)(b), Rules of the United States Supreme Court.

were used if not for a payoff, coupled with the prosecutor's previously expressed position of disbelief, that the witness asserted his Fifth Amendment privilege. This posture was strongly affirmed by the prosecutor's on-the-record comment that the witness knew what he did with the funds, but refused to explain it.

The uniqueness of this issue is that while the constitutional assertion meets the standard necessary to establish a legitimate Fifth Amendment claim, *Hoffman vs. United States,* 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1924), the claimant has received statutory immunity, which *excludes* protection from prosecution of the very crime for which the valid Fifth Amendment claim has been established. See Title 18 United States Code §6002. This appears to be a case of first impression.

In *Hoffman vs. United States,* this Court established as the basis for determining the validity of a Fifth Amendment assertion that it must be:

> "... '*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and the answer(s) *cannot possibly* have such tendency' to incriminate." 341 U.S. at 488 (citations omitted).

Weinkle has clearly established a substantial and real, not merely trifling or imaginary, hazard of incrimination for the crime of perjury. *Marchetti vs. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889

(1968). First, and primarily, the prosecutor who has conducted the grand jury investigation from its inception has expressly alleged a disbelief of the witness' proferred answer. Second, the answers, "I do not know" and "I do not remember" are approved bases for a perjury prosecution. *United States vs. Sweig*, 441 F.2d 114 (2 Cir. 1971), *Gebhard vs. United States*, 422 F.2d 281 (9 Cir. 1970), *United States vs. Nicoletti*, 310 F.2d 359 (7 Cir. 1962). Third, the fact that the witness maintains the truthfulness of his answer, *Bronston vs. United States*, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973), does not exclude the potential hazard that the answers themselves will "furnish (the necessary) link in the chain of evidence needed to prosecute the claimant for a federal crime". *Hoffman vs. United States*, 341 U.S. at 486. Indeed, it *must* be assumed that the prosecutor would not make such an allegation unless he had evidence to support it.

By proferring the answer, the witness has avoided placing himself in the posture of providing the very testimony he seeks to protect, *Glickstein vs. United States*, 222 U.S. 139, 32 S.Ct. 71, 56 L.Ed. 128 (1911), *United States vs. Knox*, 396 U.S. 77, 90 S.Ct. 363, 24 L.Ed.2d 275 (1969), thus preserving for review rather than losing the use of the privilege. *Garner vs. United States*, 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976), *United States vs. Mandujano*, 425 U.S. 564, 96 S.Ct. 1768, 48 L.Ed.2d 212 (1976).

It is without question that *immunity* does not protect against a perjury prosecution, *Glickstein vs. United States, supra*. It is equally clear that the Fifth Amendment protection must be co-extensive with the

scope of the privilege. *Counselman vs. Hitchcock*, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892), *Kastigar vs. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). Where the government seeks to compel[5] a grand jury witness into a posture which it alleges *in advance* to be a crime (false testimony) under the guise of immunity which *excludes* protection from that crime, then the government is not only abusing the system, it is also destroying the *quid pro quo* on which Mr. Justice Frankfurter relied in *Ullmann vs. United States*, 350 U.S. 422, 439, 76 S.Ct. 497, 507, 100 L.Ed. 511 (1956); that is, the immunity no longer displaces the danger.

It is the prosecutor's allegation of disbelief which raises the conflict between the immunity statute and the Fifth Amendment. Where the dictates of *Hoffman* can otherwise be satisfied, it is submitted that the assertion of the *Fifth Amendment* is proper, notwithstanding the grant of immunity, when the prosecutor *expressly* views the proffer as false. It is the question of whether the Fifth Amendment supercedes the immunity statute *under these circumstances*, that this petition presents for resolution.

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[5]The consequence of refusal, of course, is incarceration. Title 28 United States Code §1826.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari be issued to review the Judgment of the Sixth Circuit.

Respectfully Submitted,

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February 6, 1980

APPENDIX

APPENDIX A

NO. 79-5238
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: GRAND JURY PROCEEDING
United States of America
Plaintiff-Appellee

v.

JEROME WEINKLE
Defendant-Appellant

ORDER

BEFORE: LIVELY, BROWN and JONES, Circuit Judges.

This is an appeal from an order of the district court holding the appellant Jerome Weinkle in contempt of court for his refusal to answer questions asked him before a grand jury. The appellant had previously been granted immunity, but refused to answer certain questions, asserting the Fifth Amendment privilege against self-incrimination. The district court stayed execution of the contempt order pending appeal to this court on an expedited basis.

The appellant contends that the prosecutor expressed an opinion that he was not telling the truth. Therefore, appellant argues, the questions which he refused to answer were asked for the purpose of a subsequent perjury or false statement prosecution. He does not contend that a truthful answer to the questions which he refused to answer would place him in jeopardy of a perjury prosecution because of discrepancy between that answer and answers he had earlier given to the grand jury.

Upon consideration of the record together with the briefs and oral arguments of counsel the court concludes that, having been granted immunity, the appellant was required to answer the questions as previously directed by the district court. The circumstances of this case created no exception to the duty of a witness to answer after being granted immunity. *Chandler v. Garrison,* 286 F.Supp. 191 (E.D. La. 1968), relied upon by the appellant, is distinguishable in a number of respects and is not controlling.

The motion of the appellant to supplement the record is denied.

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE GRAND JURY PROCEEDING:

FINDINGS OF FACT; ORDER

On this 19th day of June, 1979, came the attorney for the government, James C. Cissell, United States Attorney for the Southern District of Ohio, for an Order finding Jerome H. Weinkle in contempt of Court for his refusal to answer questions before the October 2, 1978, Special Districtwide Grand Jury, Southern District of Ohio, at Cincinnati, Ohio, on June 19, 1979. Jerome H. Weinkle was present in person and with his attorney, Michael Rosen, Miami, Florida. On this matter the Court hereby makes the following findings of fact.

After hearing argument and being advised in the premises, the Court finds that on April 27, 1979, Jerome H. Weinkle appeared before said Grand Jury, where he was questioned concerning the circumstances surrounding a loan made by the Hotel and Restaurant Employees and Bartenders International Union to Dutch Inn of Orlando, a hotel of which he is a part owner. Mr. Weinkle also was questioned about subsequent checks drawn on the account of Dutch Inn of Orlando, which Mr. Weinkle caused to be made out to cash. Mr. Weinkle refused to answer any questions relating to the aforementioned checks.

Later that day Mr. Weinkle appeared before this Court in chambers and, by his attorney, explained that he refused to answer because, owing to the lapse of time, he had become unfamiliar with the books and records of the Inn. Thus, rather than answer in an unsure fashion and risk perjury, Mr. Weinkle asserted his privilege against self-incrimination as a ground on which he refused to answer. The Court was lenient with Mr. Weinkle, granting him two weeks in which to familiarize himself with the pertinent records which would enable him to complete his grand jury testimony.

On June 19, 1979, Mr. Weinkle again was called before the same Grand Jury, and again was asked about the aforementioned checks. Again Mr. Weinkle refused to answer, asserting his privilege against self-incrimination.

Later that day, Mr. Weinkle and his attorney again appeared in the chambers of this Court. Mr. Weinkle's attorney stated that after examining the books and records involved, Mr. Weinkle still is unable to answer quesitons concerning the purposes of the aforementioned checks, which totaled an amount of over $150,000, and that to do so might expose Mr. Weinkle to charges of perjury. Under oath, Mr. Weinkle adopted the statement of his attorney.

The Court does not believe that Mr. Weinkle had been truthful concerning this matter, either with the Grand Jury or with the Court. We therefore ordered that Mr. Weinkle again be taken before the Grand Jury and asked the same questions, and that if he refused to answer, he be returned to the Court at which time he would be cited for contempt of Court. 18 U.S.C. §402.

Mr. Weinkle's attorney stated that he believed it an unnecessary formality to return Mr. Weinkle to the Grand Jury, because he would continue to refuse to answer the same questions. Mr. Weinkle affirmed this under oath. The Court therefore dispensed with returning Mr. Weinkle to the Grand Jury. The Court concluded that Mr. Weinkle has refused to obey the Order of this Court without sufficient cause. We therefore found him in contempt of Court. *Id.*

ORDER

IT IS ORDERED that Jerome H. Weinkle is in contempt of this Court for his failure to answer questions before the said grand jury. He hereby is committed to the custody of the United States Marshal for the Southern District of Ohio, or other qualified officer, for the duration of said Grand Jury's term, or until such time as he purges himself of this contempt. Execution of this Order is stayed pending Jerome H. Weinkle's expedited appeal to the United States Court of Appeals for the Sixth Circuit.

IT IS FURTHER ORDERED that, after copies of this Order are furnished to counsel of record, this Order and the attached Findings shall be sealed and handled accordingly by the Clerk of this Court.

SO ORDERED.

/s/ DAVID S. PORTER
Chief Judge,
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NO. MS-1-79-70

IN RE GRAND JURY PROCEEDING

ORDER

In an Order dated June 22, 1979, this Court held Jerome H. Weinkle in contempt of Court for his refusal to answer questions before the October 2, 1978 Special Districtwide Grand Jury, Southern District of Ohio, at Cincinnati, Ohio, on June 19, 1979. As authority, the Court cited 18 U.S.C. §402.

Our citation to this provision, governing criminal contempt, was mistaken. Our Order therefore is amended to reflect that Mr. Weinkle has been held in contempt pursuant to 28 U.S.C. §1826, which provides a civil contempt sanction for recalcitrant witnesses.

SO ORDERED.

/s/ DAVID S. PORTER
Chief Judge,
United States District Court